THE COMMERCE COURT QUESTION

The question whether the Commerce Court shall be retained as a part of our federal machinery for regulating railways was left unsettled by Congress at its last session. Provisions for abolishing it and transferring its duties to the various United States district courts were passed as a "rider" to the Legislative, Judicial and Executive Appropriation bill. President Taft vetoed the bill in this form. As finally enacted it provided funds for the maintenance of the court, but only until March 4, 1913. Doubtless, in determining whether funds shall be provided for it beyond that date Congress will settle whether it is to be retained as a part of our judicial machinery.

The question presented is important. But it has not heretofore been discussed and dealt with on its merits. A provision for the creation of a similar body was a part of the Esch-Townsend bill, the precursor of the Hepburn act, and this passed the House with the approval and backing of President Roosevelt in 1905. But when President Taft recommended the creation of a "United States Court of Commerce" in a message on January 7, 1910, the plan aroused much opposition in Congress. It was vigorously attacked by its foes, and but lukewarmly defended by its friends, in that body. Its adoption was almost entirely due to the persevering support of the President and his administration.

The court began business on February 8, 1911, under unusual conditions. Not only did the Commerce Court come into existence while the courts in general were under fire, but it was peculiarly under suspicion from the start, because it had been frequently predicted that the railways would soon "own" it. The Mann-Elkins act, by which the court was created, made extensive changes in the Act to Regulate Commerce. The court had to construe these provisions *de novo*, deciding not only the rights of parties, but also the extent of its own jurisdiction and of the new powers of the commission. No matter what its decisions were, they were sure to cause dissatisfaction to many persons. President Taft's administration and the Senate of the Sixty-second Congress were of one political complexion; the House of Representatives of another. There were also in both houses "insurgent" or "progressive" Republican members, who were no less hostile to the administration than the Democratic majority in the House. Mr. Taft was up for re-election. His administration was responsible for the Commerce

Court's creation. If, therefore, the court rendered unpopular decisions it was pretty apt to be made a target by the administration's critics.

In its earlier decisions, the Commerce Court put its foot into the trap conditions had laid for it. It overruled the Interstate Commerce Commission repeatedly, and decided repeatedly in favor of the railroads. Thus it speedily became a target for bitter criticism. It received a heavy onslaught from the commission in the latter's annual report for 1911:

> Out of 27 cases passed on by the Commerce Court, preliminary restraining orders or final decrees have been issued in favor of the railroads in all but seven cases, and of these only three are of any magnitude. In saying that the court has ruled in favor of the railroads we do not mean that the ruling has been always adverse to the Commission, but it has been adverse to the shippers' contention. . . . In but three cases of any consequence where the Commission and the shippers have been opposed to the railroads, have the orders of the Commission been sustained even temporarily by the refusal to grant a temporary restraining order.

A bill to abolish the court was introduced by Representative Simms of Tennessee when the court had been in existence barely a year. At this critical juncture charges of improper conduct were made against one of its members, Judge Archbald, which added fuel to the flames. The abolition bill was passed by the House early in May and by the Senate early in June.

The passage by large majorities of a bill to abolish a branch of the government would, under ordinary conditions, raise a strong presumption that it deserved to be abolished. But the conditions were not ordinary. Besides, the bill was vetoed by a president, who, while he obviously must have been biased in favor of the court because he had practically created it, was well equipped by experience and training to form a judgment as to the merits of its decisions. The fact that the court had been in existence only sixteen months when the bill to abolish it was passed, suggests the possibility that it was not given a fair chance to show whether it was or was not of real value. In view of the charges that the court had been partial to the railways, it is significant that the railways did nothing in defense of it, when it was being attacked in the winter of 1912, but that several prominent lawyers for shippers, including John B. Daish of the National Hay Association, Francis B. James of the Cincinnati Receivers and Shippers Association, and Luther W. Walter of Nelson Morris and Company, actively de-

fended it before committees of Congress, and even sought legislation increasing its jurisdiction; and that the National Industrial Traffic League, the largest and most influential organization of traffic representatives of shippers in the country, adopted resolutions opposing its abolition. On the other hand, there were many shippers, especially those in the western intermountain communities, who were incensed by the court's decision in the so-called "Pacific Coast rate cases," who favored its abolition. As a matter of history, I may add that I know that the railways deliberately refrained from taking any active part in the controversy because, first, they did not think anything their representatives might do would accomplish anything; and, second, because they felt that they had little or nothing, and perhaps less than nothing, to gain by the retention of the court.

Conditions have changed since the bill was passed. The Supreme Court has rendered some decisions interpreting more fully the Interstate Commerce law and outlining more distinctly the jurisdictions of the Commerce Court and the commission. The Commerce Court itself has rendered a number of additional decisions. It may be desirable, therefore, to consider the Commerce Court question *de novo* in the light of all the evidence at present available.

The main arguments advanced for the creation of the court were: (1) It would promote expedition in the hearing of cases under the Interstate Commerce law. (2) It would secure a needed uniformity of decision in these cases which was impossible when they were tried by numerous courts all over the country. (3) The court's members, by constantly dealing with the same subject-matter and the same questions, would acquire expert knowledge that would enable them to render more intelligent and equitable decisions than could judges who lacked such knowledge.[1] The argu-

[1] In his message to Congress on January 7, 1910, President Taft said:

"Of course, every carrier affected by an order of the commission has a constitutional right to appeal to a federal court to protect it from the enforcement of an order which it may show to be *prima facie* confiscatory or unjustly discriminatory in its effect; and as this application may be made to a court in any district of the United States, not only does delay result in the enforcement of the order, but great uncertainty is caused by contrariety of decision. The questions presented by these applications are too often technical in their character and require a knowledge of the business and the mastery of a great volume of conflicting evidence which is tedious to examine and troublesome to comprehend. It would not be proper to attempt to deprive any corporation of the right to the review by a court of any order or decree which, if undisturbed, would rob it of a reasonable return upon its investment or would subject it to burdens which would unjustly discriminate against

ments that have been made in favor of the court's continuance are similar to those made for its creation.

The principal arguments advanced for its abolition are as follows: (1) Its maintenance involves additional expense to the government. (2) The expedition with which cases have been heard by it has not been satisfactory; in some instances there have been long delays; and all needed expedition could be secured by appropriate legislation if its duties were transferred to the district courts. (3) The Supreme Court must finally pass on questions of law arising under the Interstate Commerce act, and after it has done so all needful uniformity could be secured in decisions of the district courts, because the district courts would have to follow the precedents of the Supreme Court. (4) It is not necessary for a court which reviews the decisions of the Interstate Commerce Commission to have expert knowledge of transportation matters. The courts in rate cases are restricted to statutory and constitutional questions. Expert knowledge is required to pass on questions of fact; and the commission is the final judge of the facts. (5) The Commerce Court has interfered with the work of the commission by overruling it regarding matters which are exclusively within the commission's jurisdiction. (6) It has also shown a tendency unduly to favor the railways.

Let us examine these opposing arguments. The additional expense is not large. It has been estimated that the cost of marshals, clerks, offices, etc., amounts to less than $40,000 a year.[2] The five judges rank as circuit judges. The annual salary of a circuit judge is $7,000 a year. Each of the Commerce Court judges gets $1,500 a year extra during his service on it, since the sessions are held in Washington. This makes the total paid to the judges $42,500 a year. The figures indicate that the total annual expense for the court is less than $100,000. Nor can all of this be justly charged against the Commerce Court as additional expense; other courts would have to hear commerce cases if it did not. The law provides that when part of its judges are not needed for

it and in favor of other carriers similarly situated. What is, however, of supreme importance is that the decision of such questions shall be as speedy as the nature of the circumstances will admit, and that a uniformity of decision be secured so as to bring about an effective, systematic, and scientific enforcement of the commerce law, rather than conflicting decisions and uncertainty of final result."

[2] Letter of Henry S. Drinker, Jr., published in the Philadelphia *Public Ledger,* Aug. 13, 1912; also in the *Congressional Record,* Aug. 14, 1912, p 11805.

its work the Chief Justice of the Supreme Court may assign them for service elsewhere; and most of them at times have been so assigned. Judge Archbald has held court in New York, Judge Hunt in Montana, Judge Carland in St. Louis, Judge Mack in Chicago, etc. Also, the Erdman law provides that any member of the Commerce Court or the Interstate Commission may be designated to act with the federal Commissioner of Labor in mediating in railway labor disputes; and the President appointed presiding Judge Knapp to perform this duty for two years, a duty to which he has given a good deal of time. If the court should be abolished, the expenses of clerks, offices, etc., would be eliminated, and the extra money paid to its members, as such, would be saved. But their salaries as circuit judges would go on, because federal judges are appointed for life.

While there might be a very small saving to the government, there would be added expense to litigants, which would fall especially heavy on small shippers. The act establishing the Commerce Court provides that it "may direct the original record to be transmitted on appeal instead of a transcript thereof." This is practical when the reviewing court sits in the same city as the commission. It was not practical under the old system, and would not be practical if the functions of the Commerce Court were transferred to the district courts; and litigants would be put to additional expense for transcripts. Assuming that rate cases will be disposed of more expeditiously by a single court, a change to a system under which they were heard by numerous courts would further increase the expense to litigants; for the longer a case drags along the more it costs the parties. Uniformity in the decisions tends to reduce litigation and, therefore, expense. Finally, as the amounts of money involved in rate cases are so large, often running into millions, and as it is important from a strictly pecuniary view that they shall be decided right, the relatively very small amount it costs the government to maintain a special tribunal to hear them cannot be considered of much consequence, if the tribunal is performing, or can be made to perform its duties fairly and efficiently.

The second question to be considered is under what system cases may be expected to be disposed of most expeditiously. Whether appeals to the Supreme Court are made from the district courts or the Commerce Court will make little difference in the facility with which the Supreme Court will dispose of them after they reach it.

The real point, then, is under which system decisions will be arrived at more quickly in the lower courts. There are eighty-six district courts among which the present jurisdiction of the Commerce Court would be divided under a law similar to the bill passed at the last session of Congress.[3] Under the old system this jurisdiction lay with the various circuit courts. The majority of the House Committee on Interstate and Foreign Commerce in its report favoring the abolition of the Commerce Court said: "The Commerce Court has nothing to do but try these cases and ought to be able to give them great expedition. In point of fact, this has not always been done." The bill reported provided that cases arising under the Interstate Commerce act should be heard by three judges in the district courts and given precedence over other matters. This practice would be similar to that prevailing before the creation of the Commerce Court. It was contended by the majority that if the expedition act was applied in good faith by the district courts, cases would be handled as rapidly as under the Commerce Court act.

Certainly, as the majority report said, it would be natural to think that cases of a particular nature would be disposed of faster by a court hearing only them, than by eighty-six courts possessing less familiarity with the technicalities of the subject-matter involved, and having to dispose of the most diverse litigation. Besides, the district courts already are required to expedite several classes of cases, as those arising under the Sherman anti-trust law, the Elkins act, and the navigation laws, contempts before referees in bankruptcy, habeas corpus proceedings, proceedings for interference with submarine cables, and interlocutory injunctions suspending state statutes. Under practice or court rules, preference must also be given to the hearing of ordinary interlocutory injunctions, criminal cases, cases arising for a second trial, cases brought by receivers, cases brought by the United States, and jury cases.[4]

Evidence presented to committees of Congress by Attorney General Wickersham showed that under the system prevailing before the Commerce Court was created the hearing of rate cases was less rapid than it has been since. Subsequent developments sustain the position of the Attorney General. Under the old plan from the time the Hepburn act went into effect until the Commerce

[3] *H. Rep.* No. 472, 62 Cong., 2 Sess.
[4] *Ibid.*, p. 18.

Court began business the circuit courts issued seven injunctions restraining the enforcement of orders of the Interstate Commission. The periods during which the cases were pending between their filing in the court of first instance and the allowance of appeals to the Supreme Court ranged from one month to two and one half years, and averaged nine and one half months. Up to November 11, 1912, the Commerce Court had granted—or dealt with—such injunctions in 8 cases, and the similar periods varied from three months to one and one half years, and averaged six months, including the time that 4 of these cases were pending in the circuit courts before transfer.

From the time when the Hepburn act went into effect until the Commerce Court began business there were carried through the circuit courts 17 cases involving the validity of orders of the commission. The time taken to dispose of them ranged from two months to three years, and averaged eighteen and one half months. There were also 2 cases which were unfinished and which had been pending two years, and two years and five months respectively. Most of the cases that have been before the Commerce Court were transferred from the circuit courts, and the time during which they had been in the circuit courts cannot be charged against the Commerce Court. The fact that within sixteen months after it began business the Commerce Court had finally disposed of 16 cases shows that it has been reaching decisions much more quickly than did the circuit courts under the old system.

It is contended, as we have seen, that the decisions of a single court which deals exclusively with a given general subject-matter and questions of a given character are pretty sure to be more uniform and expert than those of eighty-six courts that have to handle all kinds of litigation. But, as we have also seen, the reply is made that while it is true that an expert body is required to pass on the questions of fact involved in rate cases, the Interstate Commerce Commission is an expert body and is the sole judge of the facts. Furthermore, it is said, the Supreme Court will speedily so decide statutory and constitutional questions as to cause decisions of the district courts on law points to be sufficiently uniform and expert.

Assuming for the present that the courts can now consider only statutory and constitutional questions, it does not follow that the decisions of eighty-six courts on these points would be uni-

form, or that the lack of uniformity would be a negligible evil. A court decision is at once the interpretation of statutory and constitutional provisions and their application to the case at bar. Now, no two cases, any more than two human faces, are ever exactly alike; and consequently in almost every decision the courts have to elucidate some partly or wholly new legal point. The interpreting of constitutions and statutes would never end if no more changes in them were ever made. After a higher court has made its interpretation the lower courts must interpret the higher court's interpretation. A single lower court will put pretty uniform constructions on the law and on the decisions of the higher court, but eighty-six lower courts are certain to make diverse constructions; and then nobody can safely assume that any of them is right. One power no one disputes the court's having is that of determining whether orders of the Interstate Commerce Commission are confiscatory, and of issuing temporary or permanent injunctions to restrain their enforcement pending or after determination of this question. Under the old arrangement the circuit courts sometimes differed as to whether injunctions should be issued when confiscation was alleged, even when the facts involved were substantially similar. In consequence, in one circuit the reduction in rates that the commission had sought to make might go into effect and the shippers would get the benefit of it; while in an adjoining circuit, the rates in which were also covered by the commission's order, there might be no reduction and the shippers would be placed at a competitive disadvantage with the shippers in the circuit where the injunction had been granted.

Not only is the final interpretation never put on any constitutional or statutory provision, but constant changes are made in the laws themselves. The Act to Regulate Commerce has been repeatedly amended. It undoubtedly will be in the future. A single court would construe the new amendments uniformly, while eighty-six courts would render diverse opinions. However, it is easy to exaggerate the evil of having numerous courts passing on the same questions of law. Ordinarily when one court has passed on a particular law point others of equal rank will follow the precedent established; and after the highest court has ruled on the point the diversity of opinion among the lower courts, though it may not be negligible, is certain not to be serious.

The foregoing discussion is based on the assumption that the

courts have no power to review the commission's findings of fact, but are restricted to statutory and constitutional questions. That this is true is often asserted unqualifiedly. As a matter of fact, wide differences of opinion exist among lawyers as to the extent of the jurisdiction of the courts in reviewing orders of the commission. The views on this subject may be roughly summarized under three heads.

(1) It is contended by some that all the courts can do is to ascertain, first, whether the carrier against which an order of the commission is directed is subject to the Act to Regulate Commerce; whether the subject-matter of the order is interstate commerce over which the commission has jurisdiction; whether the commission has afforded the carrier full opportunity to be heard in the premises; whether the order has been served upon the carrier in accordance with the provisions of said act; and whether the commission has found unreasonable or otherwise unlawful the rate or regulation covered by its order.[5] In other words, has the commission complied with the formal requirements of the statutes; and would the enforcement of the order deprive the carrier of a fair return on the fair value of its entire property; is it confiscatory, and, therefore, unconstitutional? The making of rates, it is said, is a legislative function "which cannot be reviewed by the court."[6] A modification of this view is that the courts probably may also inquire whether the order of the commission is so clearly wrong as to be beyond its power to make it. "It is conceivable," Commissioner Prouty has said,[7] "that a rate established by it might be so palpably unjust that the court might feel called upon to say that Congress never could have intended to invest that body with authority to make such an order."

(2) A second view is that the courts have not only the foregoing authority but also the statutory power and duty to inquire whether the rates condemned by the commission are palpably unreasonable or unjustly discriminatory, and whether those

[5] See brief filed in the Commerce Court by P. J. Farrell, Solicitor for the Interstate Commerce Commission, on "The Extent and Character of the Jurisdiction of the Commerce Court over Cases Brought to Enjoin, Set Aside, Annul, or Suspend, in Whole or in Part, any Order of the Interstate Commerce Commission."

[6] *Twenty-fifth Annual Report of the Interstate Commerce Commission,* p. 59.

[7] "Court Review of the Orders of the Interstate Commerce Commission," by Charles A. Prouty, *Yale Law Journal,* March, 1909.

it proposes to substitute are reasonable and non-discriminatory. It is true, it is said, that the fixing of a rate for the future is a legislative act and that this legislative function has been delegated to the commission; but Congress, in delegating this function, has laid down rules according to which it must be exercised, and it is for the courts to see that those rules are complied with. Section 15 of the act provides that if the commission shall be of the opinion that any rate is "unjust, or unreasonable, or unjustly discriminatory, or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this Act," it may determine and prescribe what will be the just and reasonable maximum rate thereafter to be charged. Similar powers are delegated with reference to regulations and practices. "Thus," it is said, "the power conferred upon the Commission is restricted by the limitations (a) that the power cannot be exercised except when the existing rate is unlawful; and (b) that the rate prescribed by the commission shall itself be just and reasonable."[8] These are the rules which Congress has laid down for the commission to follow. The courts should, it is conceded, give great weight to the views of the commission; but they should not hesitate to overrule it if they find that its order is clearly illegal.

(3) A third view is that the carrier has a constitutional right to a reasonable compensation for every service it renders. On this theory, even in the absence of any statutory provision to that effect, the carrier would have a right to demand that each rate fixed by the commission should be reasonable and to have the question whether it was so reviewed by the courts.[9]

Past decisions of the Supreme Court seem to indicate that it is likely finally to hold that the second view above outlined is the nearest correct. Its decision in *I. C. C. vs. Illinois Central* (215 U. S., 452) is cited, among many others, by those who contend for a very narrow court review. The Supreme Court in that case indicated that very great and almost conclusive weight

[8] See brief filed in the Commerce Court by Walker D. Hines, Chairman of the Executive Committee and General Counsel of the Atchison, Topeka & Santa Fe Ry., on "The Extent and Character of the Jurisdiction of the Commerce Court over Cases Brought to Enjoin, Set Aside, Annul, or Suspend in Whole or in Part any Order of the Interstate Commerce Commission."

[9] See brief on "The Jurisdiction of the Commerce Court Considered from the Standpoint of the Constitutional Right of a Carrier to Charge a Reasonable Compensation for Each Service," filed in the Commerce Court, by A. P. Thom, General Counsel of the Southern Railway.

must be given the commission's findings of fact, and upheld its order. It added, however, that the powers of the courts extended to the determination, not only of all relevant and pertinent questions of statutory power and of constitutional power and right, but also to the question "whether, even although the order be in form within the delegated power, nevertheless it must be treated as not embraced therein, because the exertion of authority which is questioned has been manifested in such an unreasonable manner as to cause it, in truth, to be within the elementary rule that the substance, and not the shadow, determine the validity of the exercise of the power."

In *I. C. C. vs. N. P. Ry. Co.* (216 U. S., 538) the Supreme Court set aside an order of the commission on the ground that it was not within the commission's statutory power to make it. The law authorizes the commission to prescribe a through route where no reasonable and satisfactory through route exists. In this case the Northern Pacific contended that a reasonable through route did exist. The commission ordered the establishment of another one. The question presented was a mixed one of law and fact. The Supreme Court said:

> The existence of such a [reasonable and satisfactory] route may be inquired into by the courts. . . . No doubt in complex and delicate cases great weight, at least, should be attached to the opinion of the Commission, but in the present case, at least, there is no room for difference as to these facts, and the majority of the Commission plainly could not, and would not, have made the declaration in their order but for a view of the law upon which this court must pass.

In *I. C. C. vs. S. P. Co., et al.* (219 U. S., 433) confiscation was not involved, nor was it questioned that the commission had met the formal requirements of the statutes as to giving full hearing, making its order properly, etc. The commission had issued an order setting aside new rates on lumber from the Willamette Valley to San Francisco and points on San Francisco Bay and restoring practically the old rates; and the question on which the case turned was whether the commission had confined itself to determining if the rates of the railways were unreasonable and discriminatory and to fixing in place of them reasonable and non-discriminatory rates, or had sought, as the railways alleged, to exercise an extra-legal power to control their rate-making policy. The Supreme Court decided the commission had exceeded its statutory powers, as charged, and set aside its order. Portland, although situated similarly to other points in the Willamette

Valley, except that it had water competition, was not, by the commission's order, given rates similar to those accorded to other points. Commenting on this, the Supreme Court said:

> We cannot, therefore, assume that the order was legal because it rests upon the power to correct an unreasonable rate and to substitute a reasonable rate, since to indulge in that assumption would at once beget the inevitable inference that the order was repugnant to the statute because of its discriminatory character.

The implication seems to be that for the commission to fix rates that are plainly unreasonable or discriminatory is illegal and that in such a case the courts will set its order aside. We have seen that Commissioner Prouty concedes that a rate established by the commission "might be so palpably unjust that a court would feel called upon to say that Congress never had intended to invest that body with authority to make such an order." The decisions of the Supreme Court cited seem to justify the conclusion that under the statute as it now stands the courts may not review the commission on pure questions of facts, but that they may inquire whether it has taken all the steps necessary to ascertain the facts, and whether it has correctly applied the law to the facts found; and that if they consider its order plainly unreasonable or in excess of its delegated power they will set it aside as a matter of law, even though enforcement of its order clearly would not be confiscatory of the carrier's property as a whole. If the courts do have power to review the reports of the commission, not only on pure questions of law, but also, to the extent indicated, on mixed questions of law and fact, the desirability of uniformity and expertness in their decisions is increased, and the argument for a single court to hear such cases originally is strengthened.

But expedition, uniformity, and expertness might be bought at too dear a price. And it is said that this is being done—that the Commerce Court has been interfering unduly with the work of the commission, and by its decisions has unduly favored the railways. If this be true, its attitude may be due either to its personnel or to inherent shortcomings of such a tribunal. If due to its personnel, the condition can soon be remedied by changing that personnel. For example, even if the recent impeachment proceedings against Judge Archbald had not been successful, the four years for which he was assigned to the court would have expired in 1915; and, while he would have continued to be a circuit court judge, it would not have been necessary for the Chief

Justice of the Supreme Court to reassign him to the Commerce Court. After 1914 no judge who has been on the Commerce Court can serve on it again until the expiration of one year after his last service. Therefore, its personnel will constantly change. This may not be one of its merits. In fact, I consider it a demerit simply because it tends to prevent the court from becoming a really expert body—a thing that cannot be said of the commission, whose members may repeatedly be reappointed. But this does largely dispose of any criticism of the court based on its personnel.

It is contended, however, that the jurisdiction of the court is such as necessarily to bias it against the commission. It hears only suits instituted for the setting aside, annulling, or suspending of the orders of the commission. After calling attention to this, the majority of the House Committee on Interstate and Foreign Commerce said, in its report favoring the court's abolition:[10]

> Nearly all suits brought in that court are, and will continue to be, suits against the enforcement of the commission's orders. All these suits are in fact attacks upon the commission. In all these cases the commission stands as the real defendant. These suits may be many and the charges multitudinous, but all the while there will be but one material defendant. The Commerce Court, year in and year out, must for all time, if it be continued so long, hear a never ending volume of criticism and denunciation of the commission regarding the discharge of its functions and duties. Practically every invocation of the jurisdiction of this court will be adverse to the commission. Is it possible for any five judges to remain unbiased under such conditions?

If the court became biased against the commission it would tend to overrule it. If it overruled the commission it would decide in favor of the railways. For the Supreme Court ruled in the Proctor and Gamble case that shippers cannot appeal from a decision of the commission; therefore, in the future all appeals will be made by the railways; and as the railways will appeal only cases which the commission has decided against them, if the Commerce Court reverses the commission, it will decide for the railways.

One cannot simply count up the decisions of the commission and the courts and conclude from the figures whether they are biased. There are millions of railway rates. The shippers in

[10] *H. Rep.*, No. 472, 62 Cong., 2 Sess.

their complaints attack only the relatively few that they regard as most vulnerable. Therefore, it need not surprise us, nor will it necessarily reflect on railway management or indicate bias on the part of the commission, if it be found that a large part of the commission's decisions are against the railways. Again, the commission renders many decisions. Only the railways can appeal from them. They appeal only from those they deem most pregnable. If, therefore, many of the decisions of the courts reverse the commission, this raises no implication of bias against either the commission or the courts. The Commerce Court occupies the same relative position the circuit courts formerly did. Therefore, we probably can best reach a rational conclusion as to whether the Commerce Court is biased for or against the commission and is helping or interfering with its work more than the district courts would, or is manifesting a partiality for the railways on the one hand, or the shippers on the other, by comparing its decisions with those rendered by the circuit courts. Some data regarding the decisions of the Supreme Court will also yield light.

From 1887 until 1910, 58 of the commission's orders were reviewed by the circuit courts; 25 of the cases ended in the lower courts; the commission's orders were reversed in 19 of these and sustained in 6. Of the 33 cases which went to the Supreme Court the lower courts decided 21 against the commission and 12 in its favor; and the Supreme Court decided 24 of them against the commission and 9 in its favor. Therefore, prior to 1910, 69 per cent of the decisions of the lower courts, and 73 per cent of those of the Supreme Court were against the commission.[11] Confining ourselves to the period since the Hepburn act went into effect in 1906, we find that before the Commerce Court was created the circuit courts rendered final decisions reviewing the commission's reports in 17 cases, and upheld it in 7½, or 44 per cent, and reversed it in 9½, or 56 per cent. The Commerce Court up to November 13, 1912, had finally reviewed the commission in 16 cases, and had reversed it in 6½, or 41 per cent of the total, and upheld it in 9½, or 59 per cent of the total. The Supreme Court, from 1906 up to last March, had reviewed reports of the commission in 11 cases, and had reversed it in 5, or 45 per cent of the total, and upheld it in 6, or 55 per cent of the

[11] Letter of Henry S. Drinker, Jr., Philadelphia *Public Ledger*, August 13, 1912

total.[12] In other words, the Commerce Court has reversed the commission in a smaller, and upheld it in a larger proportion of cases than either the circuit courts or the Supreme Court.

Before the creation of the Commerce Court only the railways could appeal from the commission's orders. Therefore, the percentage of cases in which the circuit courts reversed the commission before 1910 is also the percentage of cases in which they decided in favor of the railways. The Supreme Court has held that shippers cannot appeal from the commission to the Commerce Court; and the percentage of cases the Supreme Court has decided against the commission is also the percentage of cases it has decided for the railways. The Commerce Court, however, soon after it began business, held that shippers could appeal to it, and, therefore, in several of the cases in which it reversed the commission it decided in favor of the shippers. Out of the 14 cases in which steam railways were involved, in which it had rendered final decisions up to November 11, it had decided 6½, or 46 per cent, in favor of the railways and 7½, or 54 per cent, against them. Therefore, the Commerce Court has rendered final decisions in favor of the railways in a smaller proportion of cases than either the circuit courts or the Supreme Court. While the court has granted 6 temporary injunctions restraining enforcement of orders of the commission, it has also refused 12 such orders.

These figures are, of course, not conclusive. Percentages, when the figures on which they are based are small, may have little significance. The figures are given merely for what they are worth and because they are the only ones available. So far as they indicate anything they point to a different conclusion as to the general attitude of the Commerce Court from that suggested by the criticism of it in the commission's annual report for 1911. The difference is due to the fact that when the commission's report was prepared the Commerce Court had been in existence only ten months while the figures here given relate to its work during twenty-one months.

Not only did the circuit courts reverse the commission oftener in proportion than has the Commerce Court, but with one exception the cases in which they reversed it were equally important. The Pacific Coast rate cases in which the Commerce Court re-

[12] These statistics are based on data given in appendices to *House Report*, No. 472, etc., and in *Senate Document*, No. 789, etc.

versed the commission were, perhaps, in point both of money and principles involved the most important ever appealed from the commission to any court. Among the cases in which the circuit courts, acting under the Hepburn act, reversed the commission was that involving the power of the commission to reduce the charge for switching cars to the Chicago stockyards from $2 to $1 (*I. C. C. vs. A. B. Stickney, et al.*, 215 U. S. 98); that involving the legality of the commission's order regarding the distribution of cars on the Illinois Central (*I. C. C. vs. Illinois Central R. R. Co.*, 215 U. S. 452); that involving the commission's order requiring the Northern Pacific to establish a new through passenger route to the Northwest (*I. C. C. vs. N. P. Ry.*, 216 U. S. 538); the Missouri River Jobbers case (*C. R. I. & P. Ry. vs. I. C. C.*, 218 U. S. 88); the Peavey Grain Elevator case (*I. C. C. vs. F. H. Peavey & Co.*, 222 U. S. 42), and the Northwestern Lumber Rate case (*I. C. C. vs. U. P. R. R.*, 222 U. S. 541). The citations here given are to the reports of the Supreme Court in these cases. In some of them the Supreme Court overruled the circuit courts and upheld the commission. Every student of the subject will at once recognize each of them as being important.

The point may be raised that the Supreme Court has reversed the Commerce Court in several cases. Up to November 11, 1912, the Supreme Court had decided six cases on appeal from the Commerce Court, reversing its decisions in four and affirming them in two. In two[13] of the four cases in which the Commerce Court was reversed it had held it could entertain appeals of shippers, and the Supreme Court overruled it on this jurisdictional point alone; and in a third[14] of these cases the railways were not involved, the proceeding being to determine the legality of an order of the commission covering the statistical reports of water carriers. Two of the other cases decided by the Supreme Court on appeal from the Commerce Court involved the question whether the latter had properly exercised its judicial discretion in issuing preliminary injunctions restraining the enforcement of orders which had been made by the commission, both of which were un-

[13] *The Procter & Gamble Company, appellants, vs. United States; James J. Hooker, et al., appellants, vs. Martin A. Knapp, et al.; The Eagle White Lead Company, et al., appellants, vs. Interstate Commerce Commission, et al.* The last two cases mentioned were tried as one.

[14] *Interstate Commerce Commission and United States, appellants, vs. Goodrich Transportation Company, et al.*

favorable to the railways. In one of these cases,[15] as we have seen, the Supreme Court upheld the Commerce Court; and in the other[16] reversed it. In the second case[17] in which the Supreme Court upheld the Commerce Court the latter had held illegal an order of the Interstate Commerce Commission requiring interchange of traffic between two steam roads and an electric road. Therefore, in cases where the Commerce Court has ruled in favor of steam railways the Supreme Court has upheld it twice and overruled it once.

We will get further light on the attitude of the Commerce Court if we consider the reasons given by it for reversing the commission in some important cases which have not yet been passed on by the Supreme Court. One of its decisions which the commission criticised was that in *A. T. & S. F. Ry. Co., et al. vs. I. C. C., et al.* This involved an order of the commission prohibiting the railways from making an extra charge for switching cars from their main lines to industries located on spur tracks in Los Angeles. The court held that this service was different from that of switching to the railway's own depots and team tracks, and that the railway had a right to make additional charge for it. The court said:

> In cases where there is a substantial conflict in the evidence or testimony on which the finding of the Commission is based we would feel bound by the finding unless clearly and palpably against the weight of the testimony; but we do not think that this Court is concluded by the finding of the Commission based upon admitted facts, which in no wise tend to substantiate the conclusion reached. . . . Where the facts are undisputed there is no occasion for facts to be found and the ultimate conclusion of the Commission is of mixed law and fact, which certainly ought not to be held to be conclusive upon this Court.

L. & N. R. R. vs. I. C. C., et al. involved an order of the commission reducing certain rates from New Orleans to Montgomery, Selma, Mobile, and Pensacola. The court said it had read and reread the evidence with the utmost care, and added:

> It is because of our inability to understand how on the facts which there appear the report before us could have been made that the difficulty under which we labor arises. . . . If the conditions dealt with in the report of the Commission are substantially as they are there described, we should have little hesitation in dismissing the petition. For even though in that case it might seem doubtful to us

[15] *I. C. C. & U. S., appellants, vs. B. & O. R. R. Co.*
[16] *U. S. & I. C. C., appellants, vs. B. & O. R. R. Co., et al.*
[17] *B. & O. S. W. R. R. and N. & W. R. R. vs. U. S.*

whether the Commission had reached a just conclusion, it would, nevertheless, appear that there was room for differences of opinion, because different inferences were able to be drawn, and in such cases the conclusions of the Commission should be accepted as to matters thus clearly within its jurisdiction. . . . Not only is the Commission vested with a discretion which cannot be disturbed, and which we intend unqualifiedly to respect, but it is entitled to select the testimony which it will believe and rely upon according as it addresses itself to the discriminating judgment of the Commission. But it is not within the authority of the Commission to reduce the rates in this or any other case, not merely against the weight of the evidence produced to sustain them, but without anything substantial to warrant the conclusion reached or the reasons assigned therefor, and this, we are convinced, is a case of that character.

*A. T. & S. F. Ry. Co., et al. vs. I. C. C., et al. was a case in*volving an order of the commission fixing the rate on lemons from California to eastern destinations. The rate had been $1 per 100 pounds. Congress imposed an import duty of 50 cents per 100 pounds on lemons. The railways subsequently advanced the rate to $1.15. The commission ordered it restored to $1. The case turned on the question whether the commission had sought to exercise its rate-making authority to protect American lemons from foreign competition. The court decided it had, and that, therefore, its order was unlawful. It said:

> The authority granted it [the Commission] under section 15 of the Act to Regulate Commerce to prescribe reasonable rates when it shall be of the opinion that the rates fixed by the carrier are unreasonable does not confer absolute or arbitrary power to act on any considerations which the Commission may deem best for the public, the shipper, and the carrier. Its order must be based on transportation considerations.

The so-called Pacific Coast rate cases[18] involved orders made by the commission under the fourth (long-and-short-haul) section, as amended by the Mann-Elkins Act of 1910. This section prohibits a carrier from charging a higher rate for a shorter than for a longer haul; provided, however, that the commission may make exceptions to this rule and prescribe the extent to which the carrier may be relieved from its operation. It was conceded by the commission that the delegation of legislative power in the fourth section was unconstitutional unless Congress elsewhere in the act had laid down the rule according to which the commission should administer the fourth section; and it decided that Congress had

[18] *A. T. & S. F. Ry. Co., et al. vs. U. S.; U. P. R. R. Co., et al. vs. U. S.; I. C. C., City of Spokane, et al., interveners.*

laid down the rule in sections 1 and 3, which provide that all rates shall be reasonable and not unfairly discriminatory. The commission recognized the controlling force of water competition on the Pacific coast, and that this competition might compel the railways to accept rates to the coast which were unreasonably low *per se*. But it found the rates charged from eastern points to Spokane and other intermountain points excessive and unfairly discriminatory as compared with those to the coast. Without prescribing the exact rates which the railways should charge to either the coast or the interior, it prohibited them from in future charging any higher rates from St. Paul and the Missouri River to the intermountain points than to the coast, and from charging from farther east to intermountain points rates which should be more than certain percentages higher than those to the coast. The railways contended that the commission's order exceeded its statutory power, and the Commerce Court so held. The court's position was that the law authorized the commission to fix specific reasonable and non-discriminatory rates, and, when the fourth section was involved, to determine the extent to which the carrier might be relieved from the operation of the long-and-short-haul provision. The commission had not fixed nor based its order on any specific rates at all. For example, it did not forbid the carriers to make a higher rate from the Missouri River to the intermountain points than their *then existing* rate to the coast, but it forbade them to make a higher rate to the intermountain points *than any rate that they might ever make* to the coast.

"In other words," said the Commerce Court, "if the carrier from St. Paul in order to meet new water competition from New York should reduce the St. Paul-Seattle rate to a point less than at present and less than a rate reasonable *per se*, but nevertheless somewhat remunerative, it would be compelled, under this order, to grant the same rate to the interior point, even though, under these circumstances, a reasonable rate to the interior point higher than the unreasonable low rate to the coast point forced upon the carrier by such market competition under penalty of losing the business would not be in violation of section 1 or of any other provision of the act. . . . In so far as the Commission attempts thus to determine the relation of the long and short haul rates, irrespective of absolute rates it goes beyond any authority that has been vested in it, for it is not in the power of the Commission to say that 100 per cent, 107 per cent, or any given percentage of an unknown less than reasonable and non-discriminatory rate from the same point of origin to an interior point."

The court's decision in the Pacific Coast switching case[19] seems to follow closely the decision of the Supreme Court[20] in which the latter upheld a terminal charge of $2 a car for delivering livestock to the Union Stock Yards in Chicago. Its decision in the Louisville and Nashville case seems to fall within the rule laid down by the Supreme Court in the Northern Pacific through-route case, that where there is no room for difference as to the facts the courts may set aside orders of the commission. Of course, the Supreme Court may hold that the court was mistaken, and that there was room for difference as to the facts. The decision in the lemon rate case seems to be patterned exactly after the decision of the Supreme Court in the Willamette Valley lumber case. The decision in the Pacific Coast rate cases involved the construction of the amended fourth section, the correct interpretation of which is so very doubtful that hardly any two lawyers, whether those of railways or those of shippers, agree regarding it.

The foregoing discussion has led to several definite conclusions regarding the points involved in the Commerce Court controversy. These are that as the law now stands: First, the cost of maintaining the Commerce Court is not a needless expense. Second, expedition in the hearing of rate cases is desirable, and has been increased under the Commerce Court act. Third, the present jurisdiction of the courts over questions of law and over mixed questions of law and fact involved in rate cases is such that expert knowledge on the part of the judges that decide them and uniformity in their decisions are highly desirable. Fourth, the Commerce Court has not manifested a greater tendency to interfere with the work of the commission than other federal courts have or probably would, but has upheld it in a larger proportion of cases than the circuit courts or the Supreme Court. Fifth, the court has not manifested a bias in favor of the railways, for it has decided a larger proportion of cases against them than either the circuit courts or the Supreme Court. Sixth, the Commerce Court, by holding that shippers might appeal from the commission to it, did assume a wider jurisdiction than the law gives it, but its decisions in the important cases in which it has overruled the commission have apparently followed closely precedents estab-

[19] *A. T. & S. F. Ry. Co., et al. vs. I. C. C., et al.*
[20] *I. C. C. vs. Stickney, 215 U. S., 105.*

lished by the Supreme Court. The case for the court's abolition has not been established; not, at least, on the grounds assigned.

All these things may be true, and yet the present system of federal regulation may be defective because of faults in the statutes which created the Interstate Commerce Commission and the Commerce Court and under which they work. It may be that the law should make clear that the courts are not to review the commission on issues of fact at all. This unquestionably would reduce the importance of having a special court to review the commission's decisions. When Attorney General Wickersham testified before the House Committee during the hearings on the Commerce Court question he suggested that if Congress desired to limit review by the courts absolutely to questions of law it might do so by passing legislation (1) requiring the commission to state in each report its findings of fact and the reasons on which its order is based; (2) providing that all findings of fact and conclusions of policy appearing in its reports shall be final and conclusive; (3) specifically limiting review by the courts to questions of law arising on the commission's report. As we have seen, it is contended by some lawyers that the carrier has a constitutional right to a reasonable compensation for each service. On this theory the question of fact as to the reasonableness of each rate is really a constitutional question, and the power of the courts to pass on it cannot be restricted.

Assuming, however, that such legislation as Mr. Wickersham suggested would be valid, the question arises as to whether it would be expedient. If the Commerce Court has any power under the present law to review the commission's findings of fact, it is a power which, under the decisions of the Supreme Court, is very limited and should be exercised only when the court thinks the commission clearly wrong. Compared with the number of orders the commission issues, the number of appeals made from it is small. Conceding that it is the best equipped body to determine and prescribe reasonable rates, does it follow that it will never make mistakes which a reviewing body, although less expert, might detect, and which it might be desirable to have corrected? It will be recalled that the majority of the House Committee in its report favoring the abolition of the Commerce Court contended, for reasons which it set forth, that the Commerce Court could not remain impartial toward the commission. Does not the committee's reasoning regarding the attitude of the court

toward the commission apply with much more force to the attitude of the commission toward the railways? The commission is a nominal rather than a real party to proceedings before the court. The railways are real parties with a pecuniary interest to proceedings before the commission; and perhaps we might, with no injustice, paraphrase the language the committee used regarding the court, and say, "the commission year in and year out must for all time hear a never-ending volume of criticism and denunciation of the railways regarding their discharge of their functions and duties. Practically every invocation of the jurisdiction of the commission will be adverse to the railways. Is it possible for any seven commissioners to remain unbiased under such conditions?"

Besides its function of determining and prescribing reasonable rates, the commission has also to perform the executive duty of enforcing the laws against the railways. Judge Prouty, until recently chairman of the commission, in an address before the American Bar Association on August 26, 1907, said:

> That commission under the present law is charged with two sets of duties requiring diverse qualifications for their discharge. It stands, first, as the representative of the government to see that these highways are in fact public. It is commanded to enforce the provisions of the act to regulate commerce. It must see that the rates are reasonable and just; that the practices and regulations of railways are not oppressive; that the penalties provided by the act are enforced. . . . Second, this commission is in essence a judicial tribunal which hears and decides complaints. The qualifications of such a body are the exact opposite of the other. . . . I very much doubt whether the same body can properly discharge both these functions. In the end it will either become remiss in its executive duties or will, in the zeal of those, become unfit for the dispassionate performance of its judicial functions. Whatever may have been true in the past, the time has come when the commission should be relieved of all its duties except the hearing and deciding of complaints.

The recommendation made in the last sentence quoted has never been adopted. The commission is still not only the judge of the railways in rate cases, but also an agency for detecting their offenses and for instituting prosecutions against them. It would not be surprising, therefore, if the commission were not wholly impartial toward the railways. That it means to be fair goes without saying; its members are able and honorable men. But it is well within the bounds of conservatism and sobriety to say that most railway officers, at least, do not think that the com-

mission is an entirely impartial body; and their opinion cannot be wholly ignored. In these circumstances it seems very questionable if it would be fair or expedient to make the commission the sole, final judge of the facts in rate cases without at the same time so amending the law as to remove the commission from every influence that may tend to impair its impartiality. In the speech already quoted Judge Prouty added:

> It must be admitted, however, that the objection to combining in the same person the duties of a prosecutor and a trier is a wise one, which should seldom be contravened. While the orders of the commission were unimportant and subject to review in the courts, the union of these two functions may have been well enough. Plainly a different question would be presented were the jurisdiction of the commission extensive and its decision final. That practical situation has now arisen.

This "practical situation" would arise much more emphatically if the commission by express statutory enactment were constituted the sole judge of the facts in all rate cases, and its findings were made binding on the courts.

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NOTE.—Since this article was put in type the Supreme Court of the United States has rendered an opinion in the case of *I. C. C. and U. S. appellants vs. L. & N. R. R. Co.,* in which the views expressed in the text as to the limitations on the power of the Interstate Commerce Commission are sustained. This decision seems to give the courts even more authority to review the reports of the commission than I had sought in this article to show they possessed. In this case counsel for the government insisted that when the commission, in the exercise of the authority given by the Hepburn act, made an order setting a rate aside, its finding was conclusive even if it was wholly without substantial evidence to support it, provided confiscation was not involved. Counsel for the government even contended that the commission could issue a valid order in a case based upon information in its possession, and not upon testimony introduced at the hearing. The Supreme Court repudiates this entire doctrine.